Supreme Court, U.S.
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NO. 93-1821

SUPREME COURT OF THE UNITED STATES
October Term, 1993

E.R. MYERS, Warden, et al.,
Petitioners

v.

GREGORIO JIMENEZ, Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

ANSWER TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED[1]

As an introduction to its presented questions, petitioners in their petition for certiorari (hereinafter Petition) state, "[T]he Ninth Circuit . . . ruled the state trial court coerced the deadlocked jury because it inquired into the jury's numerical division but failed to give the cautionary portion of the Allen charge." Petition p. i. In actuality, the majority opinion below, as shall be discussed, was based on "the totality of circumstances" of which the numerical

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[1] Pursuant to Rules 15.2, 24.2, and 33, of this Court, respondent Jimenez shall present limited comment on the Questions Presented and Statement of the Case to the extent that petitioner's presentation may be deficient.

inquiry and omission of any cautionary language were but two of a multitude of circumstances.

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ON PETITION FOR WRIT OF CERTIORARI
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ANSWER TO PETITION FOR WRIT OF CERTIORARI

Gregorio Jimenez hereby answers the State of California's petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

STATEMENT OF THE CASE[2]

The following is offered in supplementation to Petitioners' Statement of the Case.

Upon leaving the residence of the victim (his cousin and ex-fiancee), where he had visited in an unsuccessful attempt to rekindle their engagement, Gregorio Jimenez[3] fired several shots in apparent anger after the cousin/ex-fiancee had hurled an expletive at him. She had slammed her door shut as he whirled around to shoot toward the closed door. Some shots went wide of the door, while two went through the door

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[2] See footnote 1, ante.

[3] The correct spelling of respondent's name is "Jimenez." While it is spelled correctly in the Ninth Circuit's slip opinion and the Federal Reporter, it is misspelled in the Petition.

and struck her. The key issue presented to the jury was whether Jimenez had harbored a specific intent to kill when he fired. See generally, Petition, App. A, p. 42, App. D, pp. 132-135.

As a matter of trial tactics, defense counsel forewent the option of the lesser included offense of manslaughter and argued there was reasonable doubt as to an intent to kill, and the jury was presented with an all-or-nothing choice of attempted murder or acquittal. See generally, Petition, App. A, pp. 42-43.

Petitioners' statement of the case may be misleading as to the process of deliberations. Compare Petition p. 4 with App. A, p. 43 and App. D, p. 142. In actuality, the state court records indicate that on

November 3, 1988, the jury deliberated from 9:15 a.m.-12:00 p.m. (2 3/4 hrs.), from 1:30-2:13 p.m. (3/4 hr.), a readback occurred from about 2:13-2:43 p.m. (1/2 hr.),[4] and then the jury deliberated from 2:43-4:34 p.m. (1 3/4 hrs.), though at about 3:50-3:55 p.m. the jury sent its *first* note indicating an impasse.

While defense counsel did not then make a formal objection before the trial court addressed the jury the first time, he did note a concern. Petition, App. A, p. 44.

The colloquy quoted (Petition pp. 5-8) is accurate. In addition to

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[4] In its first day of deliberation, the jury had requested to view the firearm and to have re-read to them portions of the testimony of the three key witnesses (1) appellant, (2) the victim, and (3) the victim's son. C.T., pp. 118-122.

the trial court noting that "[the movement in one direction] was important to [him] because of the nature of the type of case," (Petition p. 7), respondent would add the trial court earlier had disabused the venire of the likelihood that there would be any hardship discharges from their duty, adding *inter alia*, that the jury system was "very cumbersome" and "costs [money to] operate." R.T. pp. 25-29.

In supplementation to Petition p. 10, respondent emphasizes that even before the trial court made his second numerical inquiry and before defense counsel expressly moved for mistrial, first *the prosecutor* and defense counsel recognized mistrial may be appropriate. Compare Petition pp. 8-10 with App. A, p. 46.

REASONS FOR *NOT* GRANTING THE WRIT

Contrary to petitioners' contention that the California Supreme Court and the Ninth Circuit have developed "conflicting rules regarding supplemental charges to a deadlocked jury," Petition p. 16, in regard to the instant issue, there is no conflict. That is, while California permits numerical inquiry as to the merits but prohibits an Allen charge, People v. Gainer, 566 P.2d 997 (1977), People v. Rodriguez, 726 P.2d 113, whereas federal procedure prohibits numerical inquiry but permits an Allen charge, nevertheless, ***in neither jurisdiction are both permitted, one in conjunction with the other.***

Petitioners, in reference to other states which permit numerical

inquiry, Petition p.p. 16-17, paint with too broad a brush. Petitioners point to *no jurisdiction or cases* which permit both numerical inquiry as to the jury's division on the merits ***AND in conjunction*** an Allen charge or commentary without any cautionary supplemental instruction.

The majority of the panel below, in conformity with this Court and other circuits, Petition, App. A, pp. 51-52, n.2, and accompanying text, merely utilized the "totality of circumstances" test to determine whether appellant had been deprived of due process. The opinion below in nowise interfered with the state practice. It merely found that in the totality of circumstances, where the trial court, inter alia, treated the jury to an Allen-type comment

prohibited by state law, a holdout juror was coerced and thereby respondent was denied due process. The only state convictions placed "at stake" would be those in which the trial court made a numerical inquiry ***and*** gave an Allen charge or comment ***without*** any cautionary instruction ***and***, in which, ***given the totality of the circumstances*** a juror was coerced, but any such conviction (e.g., the instant case) should be suspect. Therefore, there is no need for certiorari review.

ARGUMENT

I

THE OPINION BELOW DOES NOT CONDEMN NUMERICAL INQUIRIES PER SE AND NO ARGUMENT HAS BEEN MADE THAT NUMERICAL INQUIRY PER SE VIOLATES DUE PROCESS. NEVERTHELESS, WHEN *IN ADDITION* TO A NUMERICAL INQUIRY, A COURT MAKES AN ALLEN-TYPE COMMENT TO THE JURY WITHOUT CAUTIONARY INSTRUCTION SUCH THAT A HOLDOUT JUROR, *GIVEN THE TOTALITY OF THE CIRCUMSTANCES*, WOULD BE COERCED, DUE PROCESS IS VIOLATED.

Introduction

Before addressing petitioners' Argument, respondent first will set forth the totality of the circumstances:

During voir dire, the trial court would not countenance any hardship discharge of a juror, telling the jurors that the jury system was "very cumbersome" and "costs [money to] operate." R.T. pp. 25-29. The trial was neither long nor complex. The trial (excluding

voir dire) started on the afternoon of Thursday, October 27, 1988, and following a weekend recess (the trial court was "dark" on Friday), continued from Monday, October 31, 1988, through Wednesday, November 2, 1988. ER 35. There were only three key witnesses: the victim, her son, and respondent.

As a trial tactic, defense counsel forewent lesser included offense verdicts and instruction, going forth on an all-or-nothing defense based on a reasonable doubt as to intent to kill. See generally, Petition, App. A, pp. 42-43.

The jury began its deliberations the following morning. During its day long deliberations, the jury made various requests in regard to the evidence, requesting to view the

firearm and to have re-read to them portions of the testimony of the three key witnesses, i.e., appellant, the victim, and the victim's son. C.T. pp. 118-122. Thereafter, the jury sent its ***first*** note of impasse, indicating they "strongly" felt they could not reach a verdict. The defense counsel indicated his concern, but the trial court inquired as to the numerical division on the merits, was informed that the vote had begun either 7-5 or 8-4 and had progressed in <u>one direction</u> to a 9-1-2 split; the trial court then, in response to the divulged information as to the movement in a sole direction, told the jury, ". . . . Well, ***that's what's important to me because of the nature of the type of case***. . . ." Petition p. 7 and App.

A, pp. 44-46 [emphasis added]. The trial court then released them until Monday morning indicating they should deliberate at least through the morning. Petition p. 7.

On Monday morning, the jury resumed deliberations. During their deliberations, they requested copies of the printed jury instructions and arguments of counsel; the former were provided and the latter denied. C.T. pp. 131-132.

After a lunch break, the jury continued deliberations, only to send to the court a ***second*** note of impasse which expressly "request[ed] ***further direction.***" Petition p. 9, emphasis added. ***Both the prosecutor and defense counsel*** opined that a mistrial would be appropriate. Petition, App. A, p. 46. The trial

court nevertheless undertook to make another numerical inquiry. In response to the court's inquiry, the foreperson stated that after two more votes, the split was 11-1. The court questioned the foreperson, "So there has been, then, ***substantial*** movement since the last time," and received an affirmative response from the foreperson. The trial court sent the jury back to deliberate, telling the jury, "***[d]ue to the fact we have had that type of movement*** . . . ." Petition, App. A, pp. 47-48.

Defense counsel objected and asked for an inquiry as to whether further deliberation would be fruitful; the trial court declined. Petition, App. A, p. 49. Approximately, one hour, forty eight minutes later, the jury, with no

further requests to the court, returned a guilty verdict.

Discussion

Petitioners begin their argument (Petition p. 19) with a quote from People v. Rodriguez, 726 P.2d 113, 142, n.14 (1986), suggesting that "[the California Supreme] Court has expressly held that a numerical-division inquiry is 'an important tool in ascertaining the probability of agreement.'" Petitioners' preceding quotation is not taken in full context; rather the Rodriguez court concluded, "We remain persuaded, as in [People v.] Carter [(1968) 68 Cal.2d 810], that a **neutral** inquiry into numerical division, **properly used**, is an important tool . . . ." People v. Rodriguez, 726 P.2d at 142, n.14.

For reasons which follow, the trial court's comments were not neutral, and, given the totality of circumstances, the inquiries were not properly used.

Petitioners' reading of the opinion below is that "the Ninth Circuit determined that if the state of California wishes to permit inquiries into the numerical division of deadlocked juries, the state must also give juries the cautionary portion of the Allen charge." Petition p. 22. Petitioners misconstrue the determination of the majority. Rather than the petitioners' slant on a supposed holding which the majority did not hold, the majority concluded that when the trial court inquired into the numerical division of the jury

and, in contravention of state law also treated the jury to an Allen-type commentary, that given the totality of circumstances, of which the failure to give a cautionary instruction was one factor, due process had been violated.

Petitioners note that Hawaii and Washington are other states within the Circuit which permit numerical polling. Petition p. 27. Hopefully, without sounding redundant, respondent stresses that *respondent has not argued nor has the majority held that there is anything impermissible with a state procedure permitting such polling per se.* Indeed, petitioners in the very next breath (ibid.) concede that neither Hawaii nor Washington permits Allen-type instruction or comment. See

State v. Watkins, 660 P.2d 1117, 1122 (Wash. 1983); State v. Villeza, 817 P.2d 1054, 1058 (Hawaii 1991). Indeed, the Villeza Court concluded that plain error requiring reversal occurred when numerical polling was linked to an Allen-type instruction, which is precisely what occurred here. Id. at 1059.

(Parenthetically, respondent notes that petitioners attempt to seek refuge in the general jury instructions given to the jury before deliberation and, in specific, CALJIC No. 17.40 which indicates how the jury should deliberate. Petition pp. 25-26, n.4, and accompanying text. State v. Villeza, 817 P.2d 1054 to which respondents themselves cite, Petition p. 27, rejects that notion, holding that such general instruction

before deliberation "has nothing to do with the issue of being deadlocked." Id. at 1059.)

Respondents then cite cases seriatim from those states which permit numerical inquiry, e.g., Missouri, Oklahoma, Mississippi, Texas, Louisiana, and New Mexico. Again, the holding below does not cast aspersions on numerical polling per se. Nevertheless, in Missouri, polling is not coercive when a "hammer" instruction or comment is not given, State v. Jamerson, 809 S.W.2d 726 (Mo. 1991), while a "hammer" instruction is coercive. State v. Burns, 808 S.W.2d 1 (Mo. 1991).

In regard to Mississippi, an Allen charge is prohibited. Edlin v. State, 523 So.2d 42 (Miss. 1988).

Similarly, Louisiana has disapproved the Allen charge, State v. Nicholson, 315 So.2d 639 (La. 1975), though where some objectional language is contained in a supplemental charge, where such supplemental charge likewise *does* contain cautionary language, e.g., a juror should not yield a conscientious conviction, coercion would not be present. State v. Caston, 561 So.2d 941, 942-943 (La.App. 1990).

The Texas case cited by petitioners, Odom v. State, 682 S.W.2d 445, 448 (Tex. Ct. App. 1984) emphasized that the instruction given to the jury indicated that the jurors should continue to deliberate without doing violence to their conscience, and the trial judge reiterated the cautionary instruction. Similarly,

in Oklahoma, affirmance is salvaged where supplemental instruction does contain cautionary language telling jurors, not to surrender their honest conviction and good conscience. Drew v. State, 771 P.2d 224, 229 (Okl.Cr. 1989). Here, in contrast, there was no ameliorative instruction, either after the first noted impasse or the second.

Petitioners then note two states, Illinois and Arizona, which have found numerical polling error, albeit harmless. Petition p. 29. Again, though, since respondent is not contending nor the majority holding that numerical inquiry is error, citation to these states has little bearing on the actual issue, let alone why this Court should grant certiorari.

Petitioners cite cases from four states, Arkansas, Georgia, Oregon, and Minnesota, for the proposition that numerical inquiry is permissible when given with supplemental instruction. Petition p. 29. However, in each of the cited cases, the supplemental language contained the cautionary language conspicuously absent in the instant case. Hardin v. State, 284 S.W.2d 111, 115 (Ark. 1955) [the jury should resume deliberations "without any individual juror waiving any conscientious conviction"]; Black v. State, 341 S.E.2d 436, 438 (Ga. 1986) [jurors should not merely acquiesce and should not abandon their honest conviction]; State v. Anderson, 78 N.W.2d 320, 326-327 (Minn. 1956) [same]; State v. Marsh, 490 P.2d 491,

500-501 (Or. 1971) [in the particular "'factual background,'" including the jury's request for further instructions on elements indicating continued deliberations, a "'modified'" and "'balanced'" supplemental instruction, including admonition not to vote except according to conscience, not coercive].

Finally, petitioners cite to the states of North Carolina, Alabama, Colorado, Iowa, and Nevada, which review the ***totality of circumstances*** to determine whether an inquiry was coercive. Petition pp. 29-30. Of course, as noted above, this is ***precisely the test used by the majority below***, and hence, these cases are hardly reason to grant certiorari. Individually, given the

totality of circumstances, each of the cited cases is distinguishable from the instant circumstances. E.g., People v. Austin, 523 P.2d 989, 993-994 (Colo. 1974) [no Allen charge or commentary; substitute judge, in absence of trial judge,[5] had inquired as to numerical split during morning deliberations; in the afternoon, jury unilaterally reported, i.e., no inquiry made, its numerical split and indicated the possibility of a verdict]; White v. State, 603 P.2d 1063 (Nev. 1979) [no indication of Allen charge or commentary]; State v. Cornell, 266 N.W.2d 15, 19 (Iowa 1978) [Allen-type charge contained cautionary language that there should "'not [be] mere acquiescence'" and

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[5] See page 28, infra.

the jurors should "'decide . . . if you can conscientiously do so. . . .'"]; Richardson v. State, 508 So.2d 289, 293-294 (Ala. Crim. App. 1987) [no Allen charge or commentary]; State v. Bussey, 361 S.E.2d 564, 566-567 (N.C. 1987) [supplemental instruction informing jury to resume deliberations "'without violence to your individual judgment and . . . [not] surrender your honest, conscientious convictions . . . ," i.e., "notable for [its] balance," not coercive].

In regard to the totality of circumstances, which the court below utilized as the appropriate test, respondent can discern at least twelve factors which may weigh in the balance of the totality of the circumstances; of these twelve, at

least ten weigh in appellant's favor.

First, one may contrast an ***affirmative inquiry*** on the part of the trial court versus an inadvertent disclosure.[6] Here, there was indeed an affirmative inquiry. Contrast Locks v. Sumner, 703 F.2d 403 (9th Cir. 1983) and United States v. Ajiboye, 961 F.2d 892 (9th Cir. 1992), where the disclosures were inadvertent. Second, an inquiry on the ***merits*** may be distinguished from an inquiry on the whether further deliberations would be useful. Here, the inquiries were on the merits rather than the fruitfulness of further deliberations. Contrast

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[6] Again, as an affirmative inquiry is countenanced by state practice, the affirmative inquiry per se is not coercive, *but* it is a factor to weigh in determining how a lay juror may be coerced.

Lowenfield v. Phelps, 484 U.S. 231, 240 (1988).[7] Third, one should consider the ***number of impasses*** or inquiries. Most often, the issue arises when only a single impasse has been announced (see, e.g., Cornell v. Iowa, 628 F.2d 1044 (8th Cir. 1980), whereas here, there were *two*. A fourth consideration is the ***degree of the split*** vote. In contrast to a 7-5 split (see ibid.), here, coercive statements were made after the first impasse when the vote was 9-1-2 and, then again, after the second impasse when the vote was *11-1*.

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[7] Chief Justice Rehnquist's discussion of the independence of the two types of inquiry and why there is a distinction between the two (484 U.S. at 240), would serve no purpose whatsoever unless merit polling was indeed more "dangerous," i.e., coercive.

Fifth, although not a requirement to preserve the issue, whether an ***objection*** was voiced is an indicia of recognition. In Lowenfield v. Phelps, 484 U.S. at 240, Chief Justice Rehnquist noted the absence of an objection. Here, after the first impasse, defense counsel noted his concern, Petition, App. A, p. 44, and after the second impasse (but before the trial court's unfortunate colloquy), *both the prosecutor and defense counsel concluded a mistrial was in order.* Petition, App. A, p. 46. A sixth criterion is the ***trend of movement***. One vote at one time (e.g., 8-4) and a different subsequent vote (e.g., 9-3) does not necessarily mean that the movement was in one direction. See, e.g., United States v. Ajiboye, 961

F.2d 892, where the trend of voting on at least one count reversed. Here, the trial court ascertained that the movement progressed in one direction (from 7-5 or 8-4, to 9-3, 9-1-2, 11-1).

Seventh is the ***identity of the judge***. For instance, the judge making the inquiry in Locks v. Sumner, 703 F.2d at 405, n.1, was a substitute for the judge who had presided at trial but who had become ill. (Therefore, since the inquiring judge had not heard any of the evidence, no juror would interpret any of his/her actions as an indication of the judge's beliefs about the case.) Here, in stark contrast, the judge was the judge who had heard the trial and who had told the jury, "That's [movement in one

direction] what's *important to me* . . . ." Petition, App. A, p. 7, emphasis added.[8]

Next (eighth), one must discern the ***timing*** of the court's comments in comparison to the inquiry or disclosure of the numerical split. Of course, this is not a case simply of a mere inquiry sans any Allen charge or analogous comment. Contrast United States ex rel. Kirk v. Director, Dept. of Corrections, 678 F.2d 723 (7th Cir. 1982); People v. Austin, 523 P.2d 989; White v. State, 603 P.2d 1063; Richardson v.

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[8] Moreover, the importance of the verdict to the trial judge as communicated to the jury, must be determined in the total context of the trial; recall that earlier the trial judge had indicated to the venire that the jury system was "very cumbersome" and "costs [money to] operate." R.T., p. 26.

State, 508 So.2d 289. Also, it is not a case where the court was treated to disclosure and gave no immediate Allen charge, only later to give an Allen charge, but then without any further disclosure or inquiry. United States v. Ajiboye, 961 F.2d 892. Rather, here, after both the first and second inquiries following statements of impasse, the court treated the jury to immediate comments concerning the value of proceeding in one direction.

A ninth standard is the ***complexity, length, and nature of the case.***[9] The instant case was neither

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[9] Two other factors would be the **length and *caliber* of deliberations before the coercion** and the **length and *caliber* of deliberations after the coercion**. While the opinion, Petition, App. A, pp. 56-57, addresses the length, it does not address the caliber. (Cont.)

complex nor long. There were only three key witnesses. The single issue for the jury to determine was whether appellant, upon leaving the residence of the victim (his cousin

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As to the *caliber* of deliberations, the jury--before the first impasse note--made no less than four requests concerning the evidence. C.T. pp. 118-122. They requested to view the firearm and to have re-read to them portions of the testimony of appellant, the victim, and the victim's son. After the court refused to excuse the jury following his first inquiry, when the jury returned to deliberate on a Monday morning, they requested a copy of the instructions and a read-back of counsels' arguments; the former was granted and the latter denied. C.T. pp. 132-133; R.T. pp. 444-446. After the second impasse and inquiry, the jury demonstrated no further inquisitiveness before rendering the verdict.

Respondent would suggest that instead of absolute time in assessing how the length of jury deliberation weighs in the balance, the length of deliberations should be considered in comparison to the length and complexity of the trial and the caliber of the deliberations.

and ex-fiancee), specifically intended to kill, when he fired in apparent anger after the cousin/ex-fiancee had hurled an expletive at him and then slammed her door shut as he whirled around to shoot toward the closed door.

As for the nature of the case, recall that defense counsel deliberately pursued an all-or-nothing strategy based on the defense theory of absence of specific intent to kill. Page 10, ante; see generally, Petition, App. A, pp. 42-43. As this Court recognized in Keeble v. United States, 412 U.S. 205, 212-213 (1973), with original italics and boldface underscoring added, "Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty

of *some* offense, **the jury is likely to resolve its doubts in favor of conviction**." Thus, while the trial court did not explicitly ask the jurors which way (guilt or acquittal) the 11-1 split had gone, still, as a matter of probability, it was toward guilt.

A tenth aspect would be the *content of the comments*. As noted above, the comments contained no cautionary language that a juror should not surrender his/her conscience. See also pages 19-22, ante. Moreover, at the crucial moment, when the jury expressly asked the judge for "further direction" as to how to proceed (in light, as the court then determined, of an 11-1 split) and the prosecutor and defense counsel both concluded a mistrial was

in order, the trial judge not only spoke to the jury but engaged the foreperson in conversation. The court, rather than merely noting to himself the movement of the vote, in the colloquy *expressly stated his observation to the jury, gained the foreperson's express agreement, and then, stating that "[d]ue to . . . that type of movement," sent the jury back for further deliberations.*

In its petition for rehearing to the Ninth Circuit, petitioners suggested that the opinion below was somehow inconsistent with prior Ninth Circuit precedent, namely, Locks v. Sumner, 703 F.2d 403. The *test* in both the instant case and Locks is *exactly the same*: "To determine whether such coercion of the jury's deliberative process occurred, the

inquiry by the judge must be viewed in light of the context in which it was made, not in isolation." Id. at 406-407. The only difference between Locks and the instant case is that taken in context, here the court's comments *were coercive* and in Locks they were not.[10]

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[10] In Locks, there had been one noted impasse, the inquiry was made by a substitute judge who had not heard the evidence, the inquiry was merely as to whether a weekend adjournment was necessary or whether the jury could possibly reach a verdict before the recess, and there was no suggestion that the jury's vote had flowed in one direction. Id. at 405, n.1, 407. *Here, inter alia*, there were two impasses, the inquiries were made by the trial judge who had heard the evidence and who had informed the jury of the expense of the jury trial, the inquiries were as to the split of the jury on the merits, the information divulged and acknowledged was that the vote had progressed in one direction, and the jury expressly sought the court's "further direction."

II

THE COURT OF APPEALS DID NOT APPLY A "NEW RULE" FOR THE FIRST TIME ON COLLATERAL REVIEW.

Petitioners correctly state that the Court below specifically held it was not announcing a new rule of criminal procedure not dictated by existing precedent. Petition p. 31 and App. A, pp. 50-51, 60-61. Petitioners' contention that a so-called "new rule" was promulgated, contrary to Teague v. Lane, 489 U.S. 288 (1989),[11] is premised on a

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[11] Since petitioners did not raise a Teague-type argument in the district court, either in its return or in its objections to the magistrate judge's recommendations, one may question whether respondent has waived such a defense. Boardman v. Estelle, 957 F.2d 1523, 1534-1537 (9th Cir. 1992); Jordan v. Ducharme, 983 F.2d 933 (9th Cir. 1993). In Boardman, the state failed to raise a Teague-type defense both in the district court and on appeal, at least before a petition for

fallacy. Implicit in its argument, Petition pp. 32-33, is the notion that the trial court did no wrong, that he merely relied on state precedent and merely inquired into the numerical division of the jury. Petition pp. 32-33. But the trial judge did more. One cannot reasonably perceive the totality of the circumstances without understanding that the trial court's colloquies with the jury served the same purpose as Allen charge.

Instead of an Allen charge per se, the trial court engaged in

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rehearing. Boardman v. Estelle, 957 F.2d at 1537. In Jordan, the appellate court exercised its discretion not to entertain a Teague objection where respondent had not raised the issue in the district court. 983 F.2d at 936. Here, like Jordan, respondent failed to raise a Teague-type defense in the district court.

colloquies which were far more coercive than an Allen charge. The essence of an Allen charge is ". . . . It is important therefore that you reach a verdict . . . .[12] It is important that you attempt to reach a verdict." Petition, App. A, p. 78. Here, the trial judge said as much if not more. After the ***first*** impasse when informed that there had been movement in one direction, the trial judge responded, "Well, that's what's important to me because of the nature of the type of case." Petition, App. A, pp. 45-46. This statement not

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[12] The ellipses immediately preceding qualify the language "It is important therefore that you reach a verdict" with the immediate language "if you can do so conscientiously." See, e.g., Petition, App. A, p. 78. As emphasized above, there was no balanced, cautionary language spoken to the jury.

only tells the minority jurors to jump on the bandwagon, it ***also*** tells the majority jurors not to jump off. After the ***second*** impasse, the jury expressly sought "further direction" from the court. The court affirmatively inquired and determined the vote was by then 11-1, voiced his observation that there had been "substantial movement," and then "[d]ue to the fact we have had that type of movement," sent the jury back. For all intents and purposes, there is no meaningful difference between the Allen charge and the court's comments.

Here, the majority employed the "the totality of circumstances" test. The totality of the circumstances standard had its origin in Jenkins v. United States, 380 U.S. 445 (1965).

In reversing a conviction obtained after the judge told the jury it was required to reach a verdict, this Court stated, "Upon review of the record, we conclude that in its context and under all the circumstances the judge's statement had the coercive effect attributed to it." Id. at 446. Similarly, in Lowenfield v. Phelps, 484 U.S. at 237, quoting Jenkins, this Court concluded, "[o]ur review of petitioner's contention that the jury was improperly coerced requires that we consider the supplemental charge given by the trial court 'in its context and under all the circumstances.'"

In Lowenfield v. Phelps, this Court was faced (as here, also) with a due process challenge to a

combination of polling and supplemental instruction. This Court held, that under the Lowenfield facts, the combination was not "coercive." Id. at 241. The Court immediately admonished, however, "By so holding we do not mean to be understood as saying other combinations of supplemental charges and polling might not require a different conclusion." Ibid. The combination of factors in this case are just such a combination which require the conclusion of coercion, the result in this case is practically dictated by Lowenfield.

Amongst the factors from which this Court concluded there had not been coercion in Lowenfield, the Chief Justice noted that the inquiry of the trial judge had been to the

numerical division as to how they stood on the question of whether further deliberations might assist them in returning a verdict, not on the numerical division as to the merits. Id. at 240. Here, though, the multiple inquiries as to numerical division were as to the **merits**; indeed, defense counsel noted that the proper inquiry would be as to whether continued deliberations would be fruitful, but the trial court refused the suggestion. Petition, App. A, p. 48.

The Chief Justice also noted there had been no objection by defense counsel as to the polls or the supplemental instruction; the Court did not suggest that the lack of objection was a waiver, but rather, the omission indicated that

the potential for coercion was not apparent to one on the spot. Lowenfield v. Phelps, 484 U.S. at 240. Here, in sharp contrast, when the jury had tendered its second note of impasse, **both** the **prosecutor** and **defense counsel** concluded that it was time to accept the impasse and declare a mistrial (Petition, App. A, p. 46); the only reasonable conclusion was that the potential for coercion was apparent.

A third contrast is the lack of balance in the trial court's statements to the jury in the case at bar. In Lowenfield, the trial court gave a neutral Allen-type instruction; neutral, that is, in the sense, that in addition to informing the jurors that each should discuss and consider the case impartially

with the other jurors, the court twice emphasized the duty of an individual juror to remain true to his or her own conscience. Thus, the trial court in Lowenfield had admonished the jury to reach an independent decision and not to surrender personal conviction simply because other jurors felt differently. Here, in conspicuous contrast, the trial court gave no such ameliorative admonition.

The opinion below is not remarkable in the test applied, "the totality of circumstances," and applies *no* "new rule." It merely has considered a totality of circumstances from which one may reasonably infer that the lone

holdout juror was coerced. Because no "new rule" has been applied, writ of certiorari is unnecessary.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

APPELLATE DEFENDERS, INC.

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